

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

*Botsford
Phm 1
118681*

FILE: B-204876

DATE: June 14, 1982

MATTER OF: Linnie V. Blevins - Claim for backpay

DIGEST:

Employee whose retirement application was disallowed by Office of Personnel Management after separation from Defense Logistics Agency, claims backpay alleging that disallowance was due to agency error. Claim is denied because employee has not submitted evidence sufficient to support a determination that he suffered an unjustified or unwarranted personnel action and, therefore, he has not met burden of proof in establishing his claim.

This decision is in response to a request for an advance decision from R. E. Melroy, Accounting and Finance Officer, Defense General Supply Center (DGSC), Defense Logistics Agency, Richmond, Virginia. Mr. Melroy has requested our opinion concerning the claim of Mr. Linnie V. Blevins for backpay from November 1, 1980, through February 19, 1981. Mr. Blevins retired on October 31, 1980, but was returned to the DGSC rolls on February 20, 1981. The Office of Personnel Management (OPM) had disallowed his request for retirement on the grounds that he did not have sufficient creditable civilian service and that he had not waived his military retired pay so that he could count his military service for civil service retirement purposes. Mr. Blevins claims that the improper filing of his retirement application and its subsequent rejection by OPM were the result of error on the part of the DGSC Office of Civilian Personnel, thus entitling him to backpay under the Back Pay Act of 1966, as amended, 5 U.S.C. § 5596. (Supp. III 1979).

We are unable to conclude that Mr. Blevins suffered an unwarranted or unjustified personnel action, a prerequisite for entitlement under the Back Pay Act, and, therefore, we must deny his claim.

The record shows that on the date of his separation, Mr. Blevins was 61 years old and had 12 years, 5 months and 25 days of creditable civilian service. He had

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retired from the military on November 1, 1967, with 26 years of Air Force and Army service and was receiving military retired pay. Apparently for the purposes of annual leave accrual, DGSC had credited Mr. Blevins with 8 years, 3 months of military service.

The age and service conditions for optional retirement are outlined in paragraph S9-1a(2), Federal Personnel Manual Supplement (FPM Supp.) 831-1 as follows:

- "(a) Age 62 and five years of civilian service, or
- "(b) Age 55 and 30 years of creditable service, including five years of civilian service, or
- "(c) Age 60 and 20 years of creditable service, including five years of civilian service."

Although military service may generally be counted as creditable service, it may not be credited if an employee is receiving military retired pay, unless he waives that pay. There are certain exceptions to this rule relating to disability retirement, none of which are relevant here. See 5 C.F.R. § 831.301(a) (1981) and paragraph S3-5a of FPM Supp. 831-1. Mr. Blevins' retirement application was disallowed by OPM because he did not waive his military retired pay, and without credit for his military service he did not have sufficient creditable service to retire under the regulations cited above.

Mr. Blevins claims that he was assured by the employee relations specialist in the DGSC Personnel Office that he could retire with 12 years of civilian service. He says that he requested this specialist to compute his projected retirement pay on the basis of 12 years of civilian service and on the basis of a combination of his civilian and military service. Because the computation showed that combining his service would cause a reduction in his total retirement pay, Mr. Blevins says he decided to retire using just his civilian service. He claims that he told the specialist he wanted to retire using only his civilian service and she responded that when he submitted his retirement request, she would retire him on that basis.

Although the employee who dealt with Mr. Blevins could not recall speaking with him, DGSC enclosed a copy of a memorandum from her in which she outlined the procedures she normally follows when counseling employees concerning their retirements. In that memorandum she stated that:

"2. In checking the OPF of an employee receiving military pay, if that employee has enough civilian service to retire, I will ask if he wishes to combine his military and civilian service. In most cases the employee knows what he wants to do. In some cases I have been asked to figure what the employee's monthly annuity would be if he does or does not combine. Most employees who have the age and civilian service do not combine their services after receiving their annuity computations from me. Annuity computations are done only if requested by the employee. If an employee does not combine his military and civilian service, I do not request the employee to provide me with copies of his military separation documents. The employee is requested to sign a statement that he is not combining his services for retirement purposes. This lets the Office of Personnel Management know the employee has not filed a waiver.

"3. If an employee meets the age but not the service requirement and needs his military service to meet the eligibility requirement, he is told he will have to combine his military and civilian service and file a waiver on his military pay with his Military Finance Center. This waiver is executed by the employee. I also give the employee a copy of a page from the FPM Supplement 831-1, Retirement, showing how the waiver should be worded. The employee has to provide this office with all military separation documents. Employee may or may not request I do a computation of his monthly

annuity. If the employee receives an acknowledgement of the waiver from the finance center before the effective date of retirement, it is attached to the application for retirement which is sent to OPM. If there's no acknowledgement of the waiver, the application for retirement, all military separation documents, and all other papers concerning the employee's retirement are forwarded to OPM."

The record does not contain a copy of Mr. Blevins' completed application for retirement. Thus, we cannot say precisely what service was claimed in support of Mr. Blevins' retirement.

The Commander, DGSC, to whom authority for making determinations concerning unjustified and unwarranted personnel actions is delegated, denied Mr. Blevins' claim. He did so on the basis that the employee who counseled Mr. Blevins had been counseling prospective retirees for a number of years using a format which included information concerning the need to combine civilian and military service in similar situations. He also pointed out that Mr. Blevins had supplied certain documents to the Civilian Personnel Office relating to his military service which were requested only when an employee expressed an intent to combine his military and civilian service. In support of his decision the Commander attached a copy of Comptroller General Decision Charles M. Kindick, B-187891, June 3, 1977.

In that decision, we denied the backpay claim of an employee who alleged that he had applied for optional retirement, which was denied by OPM, because he was misled into believing that he could use his military service to establish eligibility for civil service retirement without waiving his retired military pay. The agency claimed that it had counseled the employee with regard to the waiver requirement and that his application was accepted and processed only upon his assurance that he intended to make such a waiver. The record in this case, therefore, reflected a dispute between the parties with regard to a material fact. We denied the employee's claim, explaining that in the event of a dispute, it is the long-standing practice of this Office to resolve the matter in favor

of the Government. This practice results from the rule that the burden is on a claimant to establish the liability of the United States and the claimant's right to payment. See 4 C.F.R. § 31.7 (1971). Even though the DGSC does not present a case as strong as that presented by the agency in Kindick, supra, since it does not assert without reservation that Mr. Blevins was properly counseled, we do not believe Mr. Blevins has established the liability of the Government.

We have held that, in view of the responsibility of an agency to maintain retirement records and to counsel employees with regard to their retirement rights, if an employee's retirement is induced by administrative error and the employee is subsequently restored to the rolls of the agency, even if the retirement is voluntary, the employee is entitled to backpay for the period he was off the employment rolls. See B-175498, June 20, 1972, and cases cited therein.

The Back Pay Act, 5 U.S.C. § 5596, provides that an employee who is found to have been affected by an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or part of his pay, allowances, or differentials is entitled to recover the amount he would have received if the personnel action had not occurred. Administrative errors are considered to be a form of an unjustified or unwarranted personnel action. Under the back-pay regulations in effect during the period of Mr. Blevins' claim, an unjustified or unwarranted personnel action is defined at 5 C.F.R. § 550.802(c), as an act or omission which violates or improperly applies the requirements of a nondiscretionary provision. A nondiscretionary provision is defined at 5 C.F.R. § 550.802(d) as, "* * * any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria."

We believe what if the DGSC had misinterpreted the creditable service requirements for optional employment and assisted Mr. Blevins in submitting a retirement application based on that misinterpretation such action would be considered to be an unjustified or unwarranted

personnel action in light of an agency's responsibilities in processing retirements. See FPM Supplement 831-1, paragraph S1-4. However, Mr. Blevins' uncorroborated assertions that he was told he could retire using only his civilian service are not sufficient to prove his claim.

Nor has Mr. Blevins provided evidence sufficient to enable us to determine that DGSC violated any mandatory procedural requirement regarding retirement. We would like to point out that on Civil Service Form 1084, Information in Support of Civil Service Retirement Application, a form which is required to be completed by the agency, signed by the claimant, and attached to each Application for Retirement, SF2801, there is a reminder which states that, "[i]f military retired pay must be waived to receive Civil Service credit for military service in accordance with FPM 831-1, subchapter 53-5f, attach waiver request to this form." While attaching the waiver request to the retirement application would prevent problems such as the present one from arising, it cannot be said that this is a mandatory provision. Therefore, failure to attach the request cannot be considered to be an unjustified or unwarranted personnel action. Additionally, the claimant is required to sign the SF 1084, and if Mr. Blevins had any questions about the service claimed on that form it should have been raised then.

It appears that the procedures outlined by the retirement clerk are in accord with OPM's regulations. We note that she states that if the employee receives an acknowledgment of the waiver of military retired pay before the effective date of retirement, it is attached to the application for retirement and sent to OPM. This is in accord with paragraph S3-5f(2) of FPM Supp. 831-1 which provides that:

"The retiring employee should attach to the application for retirement a copy of the finance center's acknowledgment of the waiver, if available. Submission of the retirement application should not be delayed pending receipt of this acknowledgment, however, as the Commission will verify the waiver with the Military Finance Center."

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In view of the foregoing, Mr. Rlevins' claim is hereby denied, since he has failed to establish the violation of any nondiscretionary policy or regulation that would entitle him to backpay.

Milton J. Fowler
Acting Comptroller General
of the United States